(29,620)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 329.

SAM SILBERSCHEIN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 28, 1923.

[fol. 1] UNITED STATES OF AMERICA:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN

PETITION

To the Honorable District Court of the United States for the Eastern District of Michigan:

Your petitioner, Sam Silberschein, respectfully shows unto the court as follows:

1. That he is a citizen of the United States of America, a resident of the City of Detroit, Wayne County, Michigan in said Eastern District of Michigan.

2. That the United States of America is a sovereign power and nation.

3. That said suit is filed in pursuance of Par. 20, Sec. 24, Chapter 2 of the Judicial Code of the U. S. as found in the (Act of March 3, 1911, Chapter 231, 36 Stat. at Large 1093) providing, as follows:

"The District Court shall have original Jurisdiction as follows: * * * Concurrent with the Court of Claims, of all Claims not exceeding ten thousand dollars founded upon The Constitution of the United States or any law of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable; * * * Provided, however, that nothing in this paragraph shall be construed as giving to either the district courts or the court of claims, jurisdiction * * * to hear and determine claims for pensions."

4. That he enlisted in the United States Army on December 9th, 1917 at New York City, New York for the duration of the war, that he was discharged from Military service of the United States of America on February 8, 1918 on account of Physical disability.

[fol. 2] 5. That prior to his enlistment and at the time of his enlistment petitioner was an able bodied man. Petitioner believes that at the time he enlisted he stated he had had a vener-al disease which was noted in the military records at the time but that such disease, if any, did not prevent him from performing remunerative work or earning his living by the performance of work. That said venereal disease was the only defect, disorder or infirmity noted of record, by an authority of the United States at the time of or prior to petitioner's inception of active service.

6. That petitioner was discharged from the Military service of the United States on or about the day aforesaid with disability consisting of Chronic Orchitis, varicose veins, fallen arches, articular rheumatism, osteoporosis of the hands and feet and other ailments, all of which were incurred in, or which resulted from an aggravation during military service of said disease existing prior to military service. Petitioner positively shows that on his entry in the military service, he was not suffering from chronic orchitis, varicose veins, fallen arches, articular rheumatism, osteoporosis of the hands and feet, and other ailments from which he suffered upon his discharge from the military service. That no defect, disorder or infirmities as above enumerated except said venereal disease was recorded in a military record at the time of or prior to petitioner's inception of military service.

7. That petitioner is now and has been ever since his discharge from the military service of the United States totally disabled on account of said disabilities which were contracted in the military service, or which resulted from an aggravation during military service of a disease existing prior to enlistment.

8. That petitioner was not hospitalized for said disease on his entry into service, but immediately was placed on active military duty with Company G, 38th Infantry, U. S. A.; was required to lie [fol. 3] for long periods of time, on moist and wet ground during rifle practice; was subjected to severe strain while marching with heavy equipment; was injured by violent bayonet and rifle practice, jumping and running while in the active military service. That he is advised that he is permanently disabled and injured, and that he will require operations, medical attention and medical services in the future.

9. Petitioner shows that the Veterans' Bureau is a bureau created by Act of Congress August 9, 1921, being an act to establish a Veterans' Bureau, and to improve the facilities and service of such bureau, and further to amend and modify the War Risk Insurance Act. That said Veterans' Bureau, formerly the Bureau of War Risk Insurance awarded to petitioner on August 26th, 1918 compensation at the rate of Thirty ($30.00) Dollars a month from February 9th, 1918 to July 15th, 1918 which was later increased to $80,00 a month for that period on account of disability resulting from injuries sustained and incurred by petitioner in the line of duty, while employed in the active Military Service.

10. Petitioner shows that he was thereafter hospitalized practically continuously until he commenced an action against the United States for compensation on, to wit: February 2nd, 1922. That prior to the commencement of said action against the United States of America petitioner was awarded compensation as for temporary partial disability of Twenty (20) percent from July 16th, 1918, to March 18th, 1921, instead of One Hundred (100) percent as for temporary total disability. That your petitioner's service disability was held to be

compensable by the director of the Veterans' Bureau after March , 1921, although petitioner was hospitalized from March 18th, to February 2nd, 1922 by the Veterans' Bureau. That peti- er is informed that disabilities requiring hospitalization are con- red as total disability cases.

1. Petitioner shows that said award and said ruling so made by director of the Veterans' Bureau are not based on any facts found he examination of the petitioner, that said award and said ruling . 4] of the Veterans' Bureau are arbitrary, unjust and unlawful. t said award and said ruling constitute a usurpation of the power ed in said Bureau by the act creating said bureau, that the deci- reached on the claim of the petitioner was made contrary to the fs, if any, and the decision of said bureau is contrary to the ght of evidence on file in petitioner's case.

2. Petitioner relies particularly on section 18, being a section nding section 300 of an Act to Establish a Veterans' Bureau to improve the facilities and service of such bureau, and further mend and modify the War Risk Insurance Act, being an Act ongress passed August 9th, 1921, No. 29 of the Fed. Stat. Ann., phlet form, under date of October 1921, on page 93, said section ing as follows:

For death or disability resulting from personal injury suffered isease contracted in the line of duty on or after April 6, 1917, or an aggravation of a disability existing prior to examination, ptance, and enrollment for service, when such aggravation was ered and contracted in the line of duty on or after April 6, 1917, any commissioned officer or enlisted man, or by any member he Army Nurse Corps. (Female) or of the Navy Nurse Corps male) when employed in the active service under the War De- ment or Navy Department, the United States shall pay to such missioned officer or enlisted man, member of the Army Nurse s (Female) or of the Navy Nurse Corps (Female) or, in the retion of the director, separately to his or her dependents, com- sation as hereinafter provided; but no compensation shall be paid he injury, disease or aggravation has been caused by his own ful misconduct. That for the purpose of this section every such er, enlisted man, or other member employed in the active ice under the War Department or Navy Department who was harged or who resigned prior to the date of approval of this ndatory Act, and every such officer, enlisted man or other mem- employed in the active service under the War Department or y Department on or before November 11, 1918, who hereafter ischarged or resigns, shall be held and taken to have been in nd condition when examined, accepted, and enrolled for service, pt as to defects, disorders, or infirmities, made of record in any ner, by proper authorities of the United States at the time of or r to inception of active service, to the extent to which any such ct, disorder, or infirmity was so made of record: Provided fur- , that an ex-service man who is shown to have an active pul-

monary tuberculosis or neuropsychiatric disease (of more than 10 per centum degrees of disability in accordance with the provisions [fol. 5] of subdivision (2) of section 302 of the War Risk Insurance Act, as amended) developing within two years after separation from the active military of naval service of the United States shall be considered to have acquired his disability in such service, or to have suffered an aggravation of pre-existing pulmonary tuberculosis or neuropsychiatric disease in such service, but nothing in this proviso shall be construed to prevent a claimant from receiving the benefits of compensation and medical care and treatment for a disability due to these diseases of more than 10 per centum degree (in accordance with the provisions of subdivision (2) of section 302 of the War Risk Insurance Act, as amended) at a date more than two years after separation from such service if the facts of the case substantiate his claim. This section shall be deemed to be in effect as of April 6, 1917."

13. Petitioner shows that under said act governing the payment of compensation to ex-service men suffering disability in the active military service of the United States Government during the recent war or suffering an aggravation of a disability existing prior to examination, acceptance and enrollment for service, such aggravation having been suffered and contracted in the line of duty, that your petitioner is entitled to Eighty ($80.00) Dollars a month from July 16th, 1918 to date hereof, and until such time as disability of your petitioner ceases to be temporary total disability.

14. Petitioner shows that the action of the director of the Veterans' Bureau is arbitrary in the following particulars:

(a) In allowing compensation to March 18th 1921 and discontinuing compensation thereafter, although petitioner's physical condition on and after that date has not improved, but on the other hand has become worse, said disability after March 18 1921 being the same and resulted from the same causes, as and for which compensation was allowed to petitioner to March 18, 1921.

(b) In awarding only twenty (20) per cent temporary partial disability to petitioner for the period from July 16th, 1918 to March 18, 1921, when the undisputed evidence as found, showed that petitioner was temporarily totally disabled during said period.

[fol. 6] (c) Because the only entry of any disorder made at the time of petitioner's entry in the service was that showing petitioner to have had a venereal disease, and because there was no entry made in the records of the adjutant Genreal's Office, or in any military records at the time of or prior to petitioner's inception of military service that petitioner had chronic orchitis, varicose veins, fallen arches, articular rheumatism, osteoporsis of the hands and feet, and petitioner was discharged from the military service with all of said ailments and disabilities, and is at the present time suffering from said ailments and disabilities incurred in the military service and aggravated by said military service.

(d) Because there was no outside or intervening cause which re-ted in or produced the disabilities which your petitioner has at present time other than the military service which petitioner per-med for the United States of America.

(e) Because petitioner was hospitalized by the United States of erica practically all of the time subsequent to his discharge from military service, on account of disabilities incurred in or ag-vated by his military service.

(f) Because, it was admitted by the Veterans' Bureau and the pital authorities that petitioner has been since his discharge fering from disabilities incurred in or aggravated by his military vice, according to communications and letters attached hereto rked Exhibits A, B, C, and D, and made a part hereof.

(g) Because as late as November 23rd, 1921 after it was claimed the Veterans' Bureau that petitioner was no longer suffering from l. 7] any disability which was compensable, said Veterans' Bureau s attempting to confine your petitioner in the United States Public alth Service Hospital #37 at Waukesha, Wisconsin, That trans-rtation was issued for your petitioner, copies of which are attached reto marked Exhibits E, F, G, H, and I, which are made a part reof.

15. Petitioner shows that the United States of America has wrong-ly neglected and refused to make any payment or settlement with itioner, other than as stated herein, and that said United States America through the Veterans' Bureau has failed to comply with e War Risk Insurance Act, although it has had knowledge of peti-ner's rights through the officers and agents of said Veterans' Bu-u.

Wherefore petitioner demands judgment against the United States America for the sum of Ten Thousand ($10,000.00) Dollars.

(Sgd.) Sam Silberschein, Petitioner. Fixel & Fixel, Attorneys for Petitioner.

STERN DISTRICT OF MICHIGAN,
County of Wayne, ss:

Sam Silberschein being first duly sworn, deposes and says, that he the petitioner named in the foregoing petition; that he has read d subscribed the same and that he knows the facts therein stated be true excepting those which are stated to be upon information d belief, and as to those he believes them to be true.

(Sgd.) Sam Silberschein.

Subscribed and sworn to before me this 28th day of June, 1922. (Sgd.) Charles A. Retzlaff, Notary Public, Wayne County, Michigan. My commission expires: June 16, 1923.

[fol. 8] EXHIBIT "A" TO PETITION

Form 61

Division of Military and Naval Insurance

556.
File No. C-7923.
(Compensation Disability.)

Treasury Department,

Bureau of War Risk Insurance

Award of Compensation

To Mr. Sam Silberschein,
New York City, New York:

In accordance with the Act of Congress of October 6, 1917 and the amendments thereto, you are hereby notified that as a private, Company G., 38th Infantry, who was discharged from the Military Service of the United States on the 8th day of February 1918, you are awarded compensation in the amount of thirty dollars per month, from the 9th day of February 1918, to the 15th day of July, 1918, on account of disability resulting from injury incurred in the line of duty while employed in the active service.

Important provision of the act of War Risk Insurance Bureau here cited, but which we omitted.

Sec. 27. That whoever shall obtain receive any money, check, allotment, family allowance, compensation, or insurance under Articles II, III, or IV of this Act, without being entitled thereto, with intent to defraud the United States or any person in the military or naval forces of the United States, shall be punished by a fine of not more than $2000.00 or by imprisonment for not more than one year, or both.

Sec. 28. That the allotments and family allowances, compensation, and insurance payable under Articles II, III, and IV, respectively, shall not be assignable; shall not be subject to the claims of creditors of any person to whom an award is made under Articles II, III, or IV; and shall be exempt from all taxation: Provided, That such allotments and family allowances, compensation and insurance shall be subject to any claims which the United States may have, under Articles II, III, and IV, against the person on whose account the allotments and family allowances, compensation, or insurance is payable.

Authorized by the Bureau of War Risk Insurance.

This 26th day of August, 1918.

William C. De Lanoy, Director, (Sgd.) Per H. B. Epstein.
Approved: W. G. McAdoo, Secretary of the Treasury.

ol. 9] EXHIBIT "B" TO PETITION

Treasury Department

Washington

Bureau of War Risk Insurance

In reply refer to C-7923. JFC/afm-12.

Feb. 28, 1921.

r. Sam Silberschein,
7362 Cameron Ave.,
Detroit, Mich.

EAR SIR:

We are in receipt of your favor of recent date enclosing an affi-
vit to be used in connection with your claim for increased com-
nsation.

In reply thereto permit us to advise you that an award of com-
nsation was approved in your favor on Feb. 19, 1921, based upon
temporary total disability rating effective from July 16, 1918.

All further communications to this Bureau in this matter should
ar our file number C-7923.

By authority of the Director.

Yours very truly, (Sgd.) R. H. Hallett. R. H. Hallett, Assistant Director, in charge of Compensation & Insurance Claims Division.

[fol. 10] EXHIBIT "C" TO PETITION

Treasury Department

Washington

Bureau of War Risk Insurance

Insurance No. —.
Compensation No. 7923.
Name, Sam Silberschein.
LWD-sr.

March 18, 1921.

Mr. Sam Silberschein,
338 West Lafayette Blvd.,
c/o Wayne Co. Council, American Legion,
Detroit, Michigan.

DEAR SIR:

An amendment has been made effective changing the payments under the above compensation award to

$80.00 per month from July 16, 1918 to ——.
—— per month from —— to ——.
—— per month from —— to ——.
—— per month from —— to ——.
—— per month from —— to ——.

Reason: Medical Rating (reopened).
A statement of your account showing balance due you is as follows:

Amount due you from July 16, 1918, to Feb. 28, 1921..	$2,521.29
Amount paid you from ——, ——, to ——, ——..	.....
Balance due you.....	2,521.29

Your next payment will be for $2,521.29 and future payments will be at the rate of $80.00 for each calendar month and are due on the first day of the succeeding month. Checks will be mailed as soon as thereafter as possible.

The action taken in your claim is subject to further amendment in accordance with any additional evidence that may be received that would warrant a review.

All communications relative to payments on this account should be addressed to Compensation and Insurance Claims Division, Bureau of War Risk Insurance, Washington, D. C.

By authority of the Director:
(Sgd.) Harold W. Breining, Acting Assistant Director, in charge of Finance Division.

11] EXHIBIT "D" TO PETITION

289.

United States Veterans' Bureau,

District No. 8

Office of District Manager,

8th Flr. Leiter Bldg.

Harrison 8940; Harrison 9860

Chicago, Illinois, November 21, 1921.

reply refer to Relief Division, N. P. S.
TD/bmg.

rom: District Manager, District No. 8,
Neuro-Psychiatric Section,
United States Veterans' Bureau,
o: Sam Silberschein, C-7923,
7362 Cameron Ave.
Detroit, Michigan.
bject: Hospitalization offered with transportation.

he report of your recent examination made on Oct. 24, 1921, by xaminer of the United States Veterans' Bureau indicates that are in need of hospital care and treatment.
nclosed herewith please find transportation and hospital card of ission in order that you may receive the hospitalization recommded for you. You are requested to proceed at your earliest conence reporting to the Medical Officer in Charge of the U. S. Pub Health Service Hospital #37, Waukesha, Wisconsin.
lease advise this office of the date you enter the hospital, using enclosed franked envelope.

y direction of the District Manager.

(Sgd.) Wm. C. Witte. Wm. C. Witte, M. D., District Medical Officer, United States Veterans' Bureau.

[fol. 12] EXHIBIT "E" TO PETITION

VB205991

United States Veterans' Bureau

Government Request for Transportation

Good until Dec. 23, 1921.
Not transferable.

Chicago, Ill., Nov. 23, 1921.

The —— Company will furnish Sam Silberchein, C-7923, at Lowest rate, the following transportation: Class No. 1, of persons 1, from Detroit, Mich., via —— to Chicago, Ill.

Form No. —. Ticket No. —. Value, $—. Not valid unless countersigned in writing by issuing officer. (SGD.) F. A. Barry (Name and title of officer countersigning).

I certify that transportation has been furnished as above.

—— ——, Chief Transportation Section, 8th Dist., U. S. Veterans' Bureau.

Medical and Hospital Services. Discharged member of Military or Naval Service (official Title).

Pat. for Hosp.

Charges to be billed against United States Veterans' Bureau, Washington, D. C.

Penalty for fraudulent use, $1,000 and imprisonment.

Authorized by C. R. Forbes, Director United States Veterans' Bureau (Name and title of officer authorizing this request).

[fol. 13] EXHIBIT "F" TO PETITION

VB205993

United States Veterans' Bureau

Government Request for Transportation

Good until Dec. 23, 1921.
Not Transferable.

Chicago, Ill., Nov. 23, 1921.

The —— Company will furnish Sam Silberschein, C-7923, at lowest rate, the following transportation: Class, Number 1; of persons, 1, from Chicago, Ill., to Waukesha, Wis.

Form No. —. Ticket No. —. Value, $—. Not valid unless countersigned in writing by issuing officer. (SGD.) F. A. Barry (Name and title of Officer Countersigning).

certify that transportation has been furnished as above (place). —— ——, Chief-Transportation Section, 8th Dist., U. S. Veterans Bureau. —— ——, Medical and Hospital Services. —— —— (Signature of Traveler), Discharged Memeber of Military or Naval Service (Official Title), Pat. for Hosp.

harges to be billed against United States Veterans' Bureau, hington, D. C.
enalty for Fraudulent use $1,000 and imprisonment.
uthorized by C. R. Forbes Director, United States Veterans' Bu- (Name and Title of officer authorizing this request).

United States Veterans' Bureau

VB205994

Government Request for Transportation

ood Until Dec. 23, 1921.
ot Transferable.

Chicago, Ill., Nov. 23, 1921.

he Pullman Company will furnish Sam Silberschein, C-7923, at est rate, the following transportation: Berth, lower, 1; Class, 1; of Persons, 1, From Detroit, Mich., Via —— to Chicago, Ill. orm No. —. Ticket No. —. Value, $—. Not valid unless itersigned in writing by issuing officer. (SGD.) F. A. Barry me and Title of officer counter signing).
certify that transportation has been furnished as above.
—— ——, Chief-Transportation Section, 8th Dist., U. S. Veterans' Bureau (place). —— ——, Medical and Hospital Services. —— ——, (Signature of Traveler), Discharged member of Military or Naval Service (Official Title), Pat. for Hosp.

harges to be billed against United States Veterans' Bureau, hington, D. C.
enalty for fraudulent use $1,000 and imprisonment.
uthorized by C. R. Forbes, Director United States Veterans' Bu- (Name and Title of Officer Authorizing this request).

[fol. 14] EXHIBIT "G" TO PETITION

Card D

Hospital Admission Cards, U. S. P. H. S.

District, Eight; Station, Chicago, Illinois

U. S. Public Health Service Hosp. #37, Waukesha, Wisc. Hospital, will please admit Sam Silberschein, C-7923, Age 31, sex Male, color White, Permit No. —, for examination only. Examination and treatment.

Class, Merchant Smn; for, Smn; W. R. I.; Army; Navy; Coast Guard; Pub. Health Ser; Lighthouse Ser; Eng. Corps, Army; coast and Geodetic Sur; Emp. Compensation Co.

Remarks: Admission for observation, examination, treatment, final diagnosis, and final disposition with recommendations, by a Board.

Relief Office, N. P. Div. FtD./bmg.

Wm. G. Witte, District Med. Officer, Examining Officer.

Dated November 21, 1921.

Treasury Department, U. S. Public Health Service. Form 1971-D.

[fol.15] EXHIBIT "H" TO PETITION

LF 276

Where Meal and Lodging Requests Are Honored in Chicago, Ill.

Meals:

Thompson Restaurant.
Childs "
Blackstone Cafeteria.
Depot.
Messinger's, 9 W. Van Buren St.
Y. M. C. A.

Lodging, white patients:

Young Men's Christian Assn., 822 S. Wabash Ave.
Victoria Hotel, Van Buren & La Salle.
Grace Hotel, E. E. Noyes, Van Burean & Clark Sts.

Lodging, colored patients:

Miss Mattie McKinney, 4715 Evans Ave.
Chicago, Ill., 3rd Apt., Tel. Drexel 7383.
Y. M. C. A., 3763 S. Wabash Ave.

16] EXHIBIT "I" TO PETITION

Form 955

Original

United States Government Meal Request No. 172,253

Treasury Department,

Bureau of War Risk Insurance

Chicago, Ill., Nov. 23, 1921.

any hotel, restaurant, dining-car, or eating-house:

lease furnish one meal at your regular rate, but not to exceed 00, to Sam Silberschein, C-7923, a discharged soldier or sailor trav-g at the expense of the United States.

ood for one meal only.

C. R. Forbes, Director, By (Sgd.) J. A. Thiel, Chief Clerk Transportation Section, 8th Dist., Veterans' Bureau (name and title of officer countersigning).

certify that one meal at a cost of $1.00 has been furnished me.

—— —— (Personal signature of discharged soldier or sailor).

I certify that one meal at a cost of — has been furnished to the egoing person, and that the amount stated is the regular rate arged therefor by the undersigned.

—— —— (Personal signature of party furnishing meal).

—— (Name and street address of eating-house).

When properly executed, this request may be forwarded direct to e Bureau of War Risk Insurance, Treasury Department, Washing-n D. C. for payment, or it is collectible through any bank if en-rsed on the reverse side.

Request is not assignable. There must be no alteration or erasure natever on this request, otherwise payment will be refused.

Send this request for payment to District Office U. S. Veterans' ureau, Chicago, Ill.

Form #955

Original

United States Government Meal Request No. 172,254

Treasury Department,

Bureau of War Risk Insurance

Chicago, Ill., Nov. 23, 1921.

To any hotel, restaurant, dining-car, or eating-house:

Please furnish one meal at your regular rate, but not to exceed $1, to Sam Silberschein, C-7923, a discharged soldier or sailor traveling at the expense of the United States.

Pat. for Hosp.

Good for one meal only.

C. R. Forbes, Director, By (Sgd.) J. A. Thiel, Chief Clerk Transportation Section, 8th Dist., Veterans' Bureau (Name and title of officer countersigning).

I certify that one meal at a cost of $1.00 has been furnished me.

—— —— (Personal signature of discharged soldier or sailor).

Send this request for payment to District Office, U. S. Veterans' Bureau, Chicago, Ill.

[fol. 17] I Certify that one meal at a cost of — has been furnished to the foregoing person, and that the amount stated is the regular rate charged therefor by the undersigned.

—— (Name and street address of eating-house).

—— —— (Personal signature of party furnishing meal).

When properly executed, this request may be forwarded direct to the Bureau of War Risk Insurance, Treasury Department Washington D. C. for payment, or it is collectible through any bank if endorsed on the reverse side.

Request is not assignable. There must be no alteration or erasure whatever on this request, otherwise payment will be refused.

Filed in Clerk's Office June 28, 1922. Elmer W. Voorheis, Clerk.

[fol. 18] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

[Title omitted]

MOTION TO DISMISS—Filed Sept. 23, 1922

Now comes the United States of America, defendant in the above entitled action appearing specially and only for the purpose of making this motion, by Earl J. Davis, United States Attorney for the Eastern District of Michigan and moves the Court to dismiss this action for the following reasons:

I

Because it appears by the petition filed in this cause that the plaintiff has not stated a cause of action against the United States and that he is not entitled to maintain the claim stated in his petition against the United States.

II

Because it appears from said petition that this action is brought for the purpose of recoevring compensation under Article 3 of the War Risk Insurance Act, as amended, and that said claim does not arise under a contract of insurance issued under Article 4 of said Act.

III

Because said Act only provides for an action against the United States in the event of disagreement as to a claim under the contract of insurance between the Bureau and any beneficiary thereunder and [fol. 19] does not authorize an action against the United States for the purpose of recoevring compensation.

IV

Because under Section 15 of the War Risk Insurance Act, the Director and his successors, under the amendments to said Act, is given power and authority to decide questions arising under said Act and the amendments thereto.

V

Because the United States has not given its consent to be sued on the claim stated in said petition and is not subject to action in the United States District Court for the Eastern District of Michigan on the claim stated in said petition.

VI

Because this Court is without jurisdiction in said cause.

(Sgd.) Earl J. Davis, United States Attorney.

I hereby certify that the foregoing motion is not interposed for delay, and that the same is filed by direction of the Attorney General of the United States.

(Sgd.) Frederic L. Eaton, Assistant U. S. Attorney.

[File endorsement omitted.]

[fol. 19½] [File endorsement omitted.]

[fol. 20] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

[Title omitted]

OPINION—Filed Jan. 4, 1923

TUTTLE, *District Judge:*

The subject matter of this cause is before the court for the second time on motion to dismiss a petition brought against the United States under the so-called Tucker Act (24 Statutes at Large 505, as modified by subdivision 20 of section 24 of the Judicial Code), claiming damages in the sum of ten thousand dollars. The previous petition by the same plaintiff was dismissed by this court (280 Fed. 917) for reasons set forth in the written opinion then filed. The various sections of the War Risk Insurance Act, as changed by the different amendments thereto, were there fully reviewed and the discussion thereof need not be repeated here. Thereafter plaintiff filed the present petition seeking the same relief there sought, but making certain changes in, and additions to, his statements of fact. The motions to dismiss are identical in the two cases.

Plaintiff alleges in his petition in the instant case that he enlisted in the United States Army on December 9, 1917, and was discharged therefrom, on account of physical disability, on February 8, 1918; that before, and at the time of, his enlistment he was an able-bodied [fol. 21] man; that he believes that when he enlisted he stated that he had a venereal disease, which was noted in the military record at the time, but that such disease, if any, did not prevent him from performing remunerative work or earning his living thereby; that said disease was the only defect, disorder or infirmity noted of record by an authority of the United States at the time of, or prior to, petitioner's inception of active service; that he was discharged from military service "with disability consisting of chronic orchitis, varicose veins, fallen arches, articular rheumatism, osteoporosis of the hands and feet, and other ailments, all of which were incurred in, or which resulted from an aggravation during, military service of said disease existing prior to military service," and from none of which was he suffering on his entry into such service; that petitioner has ever since been totally disabled as a result of the said ailments and is advised that he is permanently injured and disabled and will require operations and medical attention and services in the future; that he "was hospitalized by the United States of America practically all of the time subsequent to his discharge from the military service, on ac-

it of disabilities incurred in, or aggravated by, his military serv-
" that the Bureau of War Risk Insurance and its successor, the
erans' Bureau, awarded to him certain compensation from the
e of his discharge from military service, on said February 8th,
8, until March 18, 1921, on the basis of temporary partial dis-
ity, while petitioner alleges that during this period he was totally
bled and entitled to compensation on such basis; that his dis-
ity was held by the director of the said Veterans' Bureau to be
-compensable after the date last mentioned; that "said award and
ruling so made by the Director of the Veterans' Bureau are not
d on any facts found on the examination of the petitioner," and
"arbitrary, unjust and unlawful"; that "said award and said rul-
. 22] ing constitute a usurpation of the power vested in said
eau by the act creating said Bureau, that the decision reached on
claim of the petitioner was made contrary to the proofs, if any,
the decision of said Bureau is contrary to the weight of evidence
file in petitioner's case;" that the action of the Director of said
eau is arbitrary, as the disability of petitioner after the termina-
of his compensation was the same and resulted from the same
ses as and for which compensation was previously allowed to him,
as "the undisputed evidence as found, showed that petitioner was
porarily totally disabled" during the period for which he was
nted compensation for temporary partial disability; that "it was
nitted by the Veterans' Bureau and the hospital authorities that
tioner has been since his discharge suffering from disabilities
urred in, or aggravated by, his military service, according to com-
nications and letters attached" to the petition; and that "after it
claimed by the Veterans' Bureau that petitioner was no longer
fering from any disability which was compensable, said Veterans'
eau was attempting to confine petitioner" in a certain named
ited States hospital, transportation having been issued to him
that purpose. The first of the letters just mentioned (from the
ector of the Bureau to the petitioner) is dated August 26, 1918,
l states: "You are awarded compensation in the amount of thirty
lars per month, from the 19th day of February 1918, to the 15th
of July, 1918, on account of disability resulting from injury
urred in the line of duty while employed in the active service."
e next letter is from the same Bureau to the petitioner, under date
February 28, 1921, and contains the following statement: "An
ard of compensation was approved in your favor on February 19,
1, based upon a temporary total disability rating effective from
y 16, 1918." The next succeeding letter (from the Assistant
ector of the Bureau to petitioner) is dated March 18, 1921, and
ises petitioner that his award of compensation has been changed
l. 23] to payments of eighty dollars per month, effective from
y 16, 1918. This letter contains the following statement: "The
ion taken in your claim is subject to further amendment in ac-
dance with any additional evidence that may be received that
uld warrant a review." The fourth and last of said letters, from
District Medical Officer of the Veterans' Bureau to the petitioner,
ed November 21, 1921, is as follows: "The report of your recent

examination made on October 24, 1921, by an examiner of the United States Veterans' Bureau indicates that you are in need of hospital care and treatment. Enclosed herewith please find transportation and hospital card of admission in order that you may receive the hospitalization recommended for you. You are requested to proceed at your earliest convenience, reporting to the Medical Officer in Charge of the U. S. Public Health Service Hospital No. 37, Waukesha, Wisconsin. Please advise this office of the date you enter the hospital, using the enclosed franked envelope."

The motion to dismiss alleges several grounds in support of the assertion that the petition shows on its face that petitioner is not entitled to recover thereon.

Section 300 of the War Risk Insurance Act, the Act of September 2, 1914, chapter 293, 38 Statutes at Large, 711, as amended by section 10 of the Act of June 25, 1918, 40 Statutes at Large, 609, later amended by section 10a of the Act of December 24, 1919, 41 Statutes at Large, 371, and amended further by section 18 of the Act of August 9, 1921, 42 Statutes at Large, 147, abolishing the Bureau of War Risk Insurance and creating, as its successor, the Veterans' Bureau, provides as follows: "For death or disability resulting from personal injury suffered or disease contracted in the line of duty on or after April 6, 1917, or for an aggravation of a disability existing prior to examination, acceptance, and enrollment for service, when such aggravation was suffered and contracted in the line of duty on or after April 6, 1917, by any * * * en-
[fol. 24] listed man, * * * the United States shall pay to such * * * enlisted man * * * compensation" as provided in said statute.

Section 305 of the Act, as amended by section 19 of the Act of August 9, 1921, just cited, contains the following provision:

"Upon its own motion or upon application the bureau may at any time review an award, and, in accordance with the facts found upon such review, may end, diminish, or increase the compensation previously awarded."

Section 13 of the War Risk Insurance Act provides, among other things, as follows:

"The director, subject to the general direction of the Secretary of the Treasury, shall * * * decide all questions arising under the act."

By Section 1 of the aforesaid Act of August 9, 1921, the powers and duties of the Director of the War Risk Insurance Bureau were transferred to the Director of the newly created successor to that Bureau, namely, the Veterans' Bureau, subject to the general direction of the President. By Section 2 of the Act last cited, it is provided that the Director therein mentioned "shall decide all questions arising under this Act except as otherwise provided therein." It is not, and cannot properly be, claimed that the present case falls within any such exception thus reserved.

The previous petition of the plaintiff already referred to was dismissed by this court for the reason that the very statute on which plaintiff relied for recovery provided that the Director of the Bureau in question was expressly vested by Congress with power to decide the question raised by said plaintiff, and that it appeared from the face of the petition that such Director had already decided such question adversely to the plaintiff. Among other things, this court there said:

"It is plain that Congress intended to confer upon the administrative officer mentioned full and exclusive authority to decide all questions arising under the Act in so far as they involved the exercise of executive duties and required the determination of disputed questions of fact, and to the extent indicated to make such decisions final and not reviewable by the courts."

[fol. 25] Upon re-examinaion of the question there considered and decided and the principle of law held to be controlling, together with a close examination and study of all of the allegations in the present petition, I am of the opinion, not only that the former case was correctly decided, but that the same considerations and resultant conclusions are equally applicable to the present case. It is well settled that when Congress has enacted a statute creating rights or privileges and has therein conferred upon an executive officer of the Government power to apply and enforce such statute and to decide questions arising thereunder, without making the decisions of such officer reviewable by the courts, such a decision, made in the exercise of the jurisdiction thus conferred, is final and conclusive and not subject to review by the courts unless affirmatively shown to have been based upon no supporting evidence or upon a pure question of law or to have been so arbitrary and unfair as to amount to a denial of due process of law. Decatur vs. Paulding, 14 Peters, 497; United States vs. Black, 128 U. S. 48; Medbury vs. United States, 173 U. S. 492; United States vs. Hitchcock, 190 U. S. 316; Bates & Guild Co. vs. Payne, 194 U. S. 106; Public Clearing House vs. Coyne, 194 U. S. 497; United States vs. Fisher, 223 U. S. 683; United States vs. Laughlin, 249 U. S. 440; United States vs. Babcock, 250 U. S. 328; Silberschein vs. United States, supra. Careful scrutiny and consideration of the facts and circumstances alleged in the present petition make it clear, in my opinion, that, treating all of the allegations of such facts as true (which must be done for the purposes of this motion to dismiss) plaintiff has not made it to appear that the decision of the executive official complained of was in excess of his jurisdiction nor that it was without any evidentiary support, nor that it was based wholly upon a question of law, nor that it was the result of arbitrary unfairness warranting the interference of this court.

[fol. 26] It is true that certain changes have been made by plaintiff, in his present petition, as compared with the allegations in his former petition, and that he has now made a number of new statements of fact. These, however, are insufficient, under the applicable rule of law just mentioned, to entitle plaintiff to the relief sought. Thus, he now alleges, as he failed to do in his former petition, that the order complained of was not based on any facts "found on the

examination of the petitioner." It is not, however, asserted by him that such order was wholly unsupported by any evidence whatever, from any source. Plaintiff has now also added an averment that said decision is "arbitrary, unjust and unlawful." This, however, is merely the expression of a legal conclusion and not an allegation of any issuable fact. The same is true of the complaint (not made in the previous petition) that the award and ruling of the Bureau constitute a "usurpation" of power by the executive officials in question. The allegations, not made in the former petition, that such decision was "contrary to the proofs, if any," and that it was "contrary to the weight of evidence on file in petitioner's case," if true, afford no ground for complaint, as this court will not substitute its judgment for that of the Bureau on disputed questions of fact, even if on the same facts the court might itself have made a different finding thereon. The question involved in this connection is not whether, in the opinion of this court, there was sufficient evidence to support the decision, but merely whether there was any such evidence. Nor is plaintiff aided by his present assertion, not set forth in his first petition, that "the undisputed evidence, as found, showed that petitioner was temporarily totally disabled" during the period referred to, as it is not alleged that such evidence showed that said disability resulted from injury or disease caused or aggravated "in the line of duty" as provided by the statute relied on. The allegation [fol. 27] in the present, but not in the former, petition to the effect that the action of the director of the Bureau is "arbitrary, as the disability of petitioner after the termination of his compensation was the same and resulted from the same causes as and for which compensation was previously allowed to him," is without force for the reason that it overlooks the statutory provision, hereinbefore quoted, authorizing the Bureau to review an award at any time, upon its own motion or on application, and terminate or reduce the amount of such award. It is plain that the present petition does not show sufficient facts and circumstances to entitle plaintiff to the relief prayed.

It follows that the petition must be dismissed and an order will be entered accordingly.

(Sgd.) Arthur J. Tuttle, District Judge. Detroit Mich., January 4, 1923.

[File endorsement omitted.]

[fol. 27½] At a session of the District Court of the United States for the Eastern District of Michigan, continued and held, pursuant to adjournment, at the district court-room, in the city of Detroit, in said district, on Thursday, the fourth day of January, in the year of our Lord one thousand nine hundred and twenty-three.

Present: The Honorable Arthur J. Tuttle, United States District Judge.

[Title omitted]

ORDER DISMISSING PETITION

In this cause motion to dismiss the petition having been heretofore duly argued and submitted, and the court having taken time for mature deliberation, and being fully advised in the premises does now here

Order that said motion to dismiss petition be, and the same is, hereby granted, for the reasons set forth in the written opinion this day filed herein.

(Sgd.) Arthur J. Tuttle, District Judge.

[fol. 28] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

In Bankruptcy

ORDER AMENDING PETITION

[Title omitted]

At a Session of said Court Held in the Post Office Building, Detroit, Wayne County, Michigan, on Monday, February 19th, 1923.

Present: The Honorable Charles C. Simons, District Judge.

Motion having been filed by the plaintiff herein for an order to amend the petition filed in the above suit nunc pro tunc, and said motion having come on to be heard before me, and after hearing arguments thereon and both parties being represented in court by counsel, on due cause shown,

It is hereby ordered that the word "or" may be, and is hereby changed to "and" in the following places in said petition:

In line five of paragraph six;
In line four of paragraph seven;
In line eleven of paragraph fourteen C;
In line four of paragraph fourteen C;
In line three of paragraph fourteen F.

(Sgd.) Charles C. Simons, District Judge.

[fol. 29] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

[Title omitted]

CERTIFICATE OF JURISDICTION

At a Session of said Court Held in the Post Office Building, in the City of Detroit, County of Wayne, District and State Aforesaid, on the 5th Day of March, 1923.

Present: Hon. Charles C. Simons, District Judge.

I, Charles C. Simons, District Judge of the Eastern District of Michigan, hereby certify that the jurisdiction of said court over the subject matter in said suit is in issue. That a petition was filed by Sam Silberschein, plaintiff herein, against the United States of America, defendant herein, in which said Silberschein seeks to recover from the United States of America compensation under Section 300 of the War Risk Insurance Act, being the act of September 2. 1914, chapter 293, 38 Statutes at Large 711, as amended by section 10 of the Act of June 25, 1918, 40 Statutes at Large 609, as amended by the Act of December 24, 1919, 41 Statutes at Large 371, as amended by the Act of August 9, 1921, 42 Statutes at Large, 157, for disabilities incurred in the military service and disabilities existing prior to examination, acceptance, and enrollment in said military service, which were aggravated by said military service.

Defendant has challenged the jurisdiction of this court to grant the relief prayed for in said petition, on the following grounds:

[fol. 30] 1. Because the War Risk Insurance Act, supra, does not provide for an action against the United States for the purpose of recovering compensation.

2. Because under Section 13 of said War Risk Insurance Act, the director and his successors are given power and authority to decide questions arising under said act.

3. Because the United States has not given its consent to be sued on the claim stated in plaintiff's petition.

(Sgd.) Charles C. Simons, District Judge.

[fol. 31] PETITION OF SAM SILBERSCHEIN FOR WRIT OF ERROR—Filed March 8, 1923

Now comes Sam Silberschein plaintiff herein, feeling himself aggrieved by the final judgment of this court dated January 4th, 1923, and entered the same date in said case No. 6784, dismissing the petition filed by said Sam Silberschein for compensation under the War Risk Insurance Act, in the amount of, to wit, $10,000,

hereby prays that a writ of error be allowed to him said Sam Silberschein from the Supreme Court of the United States of America to the District Court of the United States for the Eastern District of Michigan, and in connection herewith said Sam Silberschein presents his assignments of error.

Sam Silberschein, By Fixel & Fixel, His Attorneys. Dated Detroit, Michigan, March 8th, 1923.

Filed in Clerk's Office March 8, 1923. Elmer W. Voorheis, Clerk.

[fol. 32] UNITED STATES OF AMERICA:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Mar. 8, 1923

Now comes Sam Silberschein plaintiff herein, by his attorneys, and in connection with his petition dated March 8th, 1923 for a writ of error, makes and files the following assignment of errors in support of said writ, which he alleges occurred at the hearing and in the decision of the above named court, on the petition dated June 28th, 1922 of Sam Silberschein praying for a judgment against the United States of America in the amount of $10,000, as compensation under the War Risk Insurance Act, which said decision is contained in the order dated January 4th, 1923 of said court, in the above designated cause; and said petitioner says that in the records and proceedings in said cause in said District Court, and in the opinion filed on January 4th, 1923, entered in said cause denying petitioner any relief, error intervened to the prejudice of said Sam Silberschein and said Sam Silberschein here files the following errors:

1. That the court erred in dismissing plaintiff's petition herein.

2. That the court erred in determining that plaintiff's petition did not show sufficient facts and circumstances to entitle plaintiff to the relief prayed.

[fol. 33] 3. That the court erred in holding that the decision of the director of the Veterans Bureau, in so far as it involves the exercise of executive duties, and requires the determination of disputed questions of fact, is not reviewable by said court.

4. That the court erred in holding that plaintiff's petition failed to show that the decision of the executive official complained of was in excess of his jurisdiction.

5. That the court erred in holding that plaintiff's petition failed to show that the decision of the official conplained of was without any evident-ary support.

6. That the court erred in holding that the plaintiff's petition failed to show that the decision of the official complained of was the result of arbitrary unfairness warranting the interference of said court.

7. That the court erred in holding that plaintiff did not allege that plaintiff's temporary disability resulted from injuries or disease caused or aggravated in the line of military duty.

8. That the court erred in denying petitioner's claim that the Veterans Bureau had failed to comply with the War Risk Insurance Act, and had wrongfully neglected and refused to make any payment or settlement of petitioner's claim.

Wherefore by reason of all of which said Sam Silberschein prays that the order dismissing plaintiff's petition, entered as aforesaid on January 4th, 1923, may, for the errors aforesaid and for other errors in the record and proceedings herein, be reversed, and that said Sam Silberschein be granted a hearing on the merits of his petition, and that said Sam Silberschein may have such other and further relief as the law, rules and practice of this court prescribed.

Fixel & Fixel, Attorneys for Petitioner and Plaintiff, Sam Silberschein. Dated Detroit, Michigan, March 8th, 1923.

[File endorsement omitted.]

[fol. 34] UNITED STATES OF AMERICA:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

[Title omitted]

ORDER ALLOWING WRIT OF ERROR

At a Session of said Court Held in the Post Office Building on March 8th, 1923

Present: Honorable Charles C. Simons, District Judge.

On reading and filing the petition in the above entitled cause of Sam Silberschein, praying for the allowance of a writ of error from the Supreme Court of the United States of America, to the District Court of the United States for the Eastern District of Michigan, Southern Division, said petition being dated the 8th day of March, 1923, and said Sam Silberschein having filed simultaneously with the presentation of said petition for writ of error his assignments of error, in connection therewith, and upon due consideration of the records in said cause.

It is ordered that a writ of error be allowed from the Supreme Court of the United States of America to the District Court of the United States for the Eastern District of Michigan, Southern Division, as

yed for in said petition to review the order entered in said cause January 4th, 1923, by virtue of which the petition filed in said se was dismissed.

l. 35] And it is further ordered that said writ of error and citation thereon be issued, served and returned to said Supreme Court of United States of America, in accordance with the law.

t is further ordered that the amount of a bond for costs on said t of error is fixed at the sum of Two Hundred Fifty Dollars.

(Sgd.) Charles C. Simons, United States District Judge.

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l. 36 & 37] UNITED STATES OF AMERICA:

THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

[Title omitted]

ND ON WRIT OF ERROR [for $250.00; Approved by District Judge] —Filed Mar. 10, 1923

[Omitted in printing]

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l. 38] UNITED STATES OF AMERICA:

THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

[Title omitted]

PULATION AS TO CONTENTS OF PRINTED RECORD ON WRIT OF ERROR—Filed Apr. 18, 1923

t is stipulated by and between Sam Silberschein the plaintiff, ein, and the United States of America, defendant herein, through r respective attorneys, that the clerk of said court may be and he ereby, directed to certify a transcript of the record for the use he Supreme Court of the United States of America on the trial he Writ of error of said Sam Silberschein from the order of this rt on January 4, 1923, dismissing the petition filed by said plain- by including in said record the following:

. The petition filed by the plaintiff.

. Motion to dismiss, filed by defendant.

. The Courts opinion (January 4, 1923).

he Courts certificate that a jurisdictional question is involved, arch 5, 1923).

4. The amendment of plaintiff's petition, Nunc Pro Tunc.

5. Petition of Plaintiff for writ of error, (March 8, 1923).

6. Assignment of errors on behalf of Plaintiff, (March 8, 1923).

[fol. 39] 7. Order allowing writ of error, (March 9, 1923).

8. Bond on appeal, (March 9, 1923).

9. Stipulation as to contents of Printed Record on writ of error. Fixel & Fixel, Attorney for Plaintiff. (Sgd.) Earl J. Davis, Attorney for Defendant. (Sgd.) F. L. Eaton, Assistant. Dated Detroit, Michigan, April 9th, 1923.

[File endorsement omitted.]

[fol. 40] WRIT OF ERROR

THE SUPREME COURT OF THE UNITED STATES, WASHINGTON, D. C.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

The President of the United States to the honorable the judge of the District Court of the United States for the Eastern District of Michigan, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you or some of you, between Sam Silberschein, Plaintiff and United States of America, Defendant a manifest error hath happened, to the great damage of the said Sam Silberschein as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, Washington, D. C. together with this writ, so that you have the same at Washington, in said District on the *7th day of April next, in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable William Howard Taft, Chief Justice of the United States, the eighth day of March, in the year of our Lord one thousand nine hundred and twenty-three, and of the Inde-

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*Not exceeding 30 days from the day of signing the citation.

endence of the United States of America the one hundred and forty-
venth.

Elmer W. Voorheis, Clerk of the District Court of the United States for the Eastern District of Michigan. [Seal of the District Court of the United States, Eastern District of Michigan.] Allowed by —— ——, United States District Judge.

[File endorsement omitted.]

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ol. 41] CITATION AND SERVICE

HE SUPREME COURT OF THE UNITED STATES, WASHINGTON, D. C.

NITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a session the *the* Supreme Court of the United States, to be holden at e City of Washington, D. C., on the *7th day of April next, pur-ant to Writ of Error filed in the Clerk's Office of the District Court the United States for the Eastern District of Michigan, wherein m Silberschein is plaintiff in error and you are defendant in error, show cause, if any there be, why the Judgment rendered against e said Plaintiff in error in the said Writ of Error mentioned, ould not be corrected, and why speedy justice should not be done to e parties in that behalf.

Witness the Honorable William Howard Taft, Chief Justice of the ited States, this eighth day of March in the year of our Lord one ousand nine hundred and twenty-three, and of the Independence the United States of America the one hundred and forty-seventh.
Charles C. Simons, United States District Judge.

Due and timely service of the within citation is hereby accepted.
Earl J. Davis, United States District Attorney.

[File endorsement omitted.]

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*Not exceeding 60 days from the day of signing.

[fol. 42] At a session of the District Court of the United States for the Eastern District of Michigan continued and held, pursuant to adjournment, at the district court-room, in the city of Detroit, in said district, on Friday, the sixth day of April, in the year of our Lord one thousand nine hundred and twenty-three.

Present: The Honorable Arthur J. Tuttle and the Honorable Charles C. Simons, United States District Judges.

[Title omitted]

ORDER ENLARGING TIME

Upon the Application of the Clerk of this Court, for cause shown, it is by the Court now here ordered that the time in which to file and docket printed record on Writ of Error in this cause, be and the same is hereby extended to and including the eight- day of May, A. D. 1923.

Charles C. Simons, United States District Judge.

[Endorsed:] 15½. No. 6784. United States District Court, Eastern District of Michigan, Southern Division. Sam Silberschein vs. United States of America. Order Extending time to file and docket printed record on Writ of Error to May 8, 1923. Filed April 6th, 1923, at — o'clock — M. Elmer W. Voorheis, Clerk, By Francis X. Konis, Deputy Clerk.

[fol. 43] At a session of the District Court of the United States for the Eastern District of Michigan continued and held, pursuant to adjournment, at the district court-room, in the city of Detroit, in said district, on Tuesday, the eighth day of May, in the year of our Lord one thousand nine hundred and twenty three.

Present: The Honorable Arthur J. Tuttle and the Honorable Charles C. Simons, United States District Judges.

[Title omitted]

ORDER ENLARGING TIME

Upon the application of the Clerk of this Court, for cause shown, it is by the Court now here ordered that the time in which to file and docket printed record on Writ of Error in this cause, be and the same is hereby extended to and including the eighteenth day of May, A. D. 1923.

Charles C. Simons, United States District Judge.

[fol. 44] UNITED STATES OF AMERICA:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN

[Title omitted]

CLERK'S CERTIFICATE

EASTERN DISTRICT OF MICHIGAN,
Southern Division, ss:

I, Elmer W. Voorheis, Clerk of the District Court of the United States for the Eastern District of Michigan, do hereby certify and return to the writ of error of plaintiff in the above entitled cause; that it is a true copy of the record and proceedings as stipulated by attorneys for respective parties, as the same appear of record and on file in my office; that I have compared the same with the originals, and it is a true and correct transcript therefrom and of the whole thereof as designated.

In testimony whereof I hereunto set my hand and affix the official seal of said court, at Detroit, in said District, this Eighth day of May, in the year of our Lord one thousand nine hundred and twenty-three, and of the Independence of the United States of America the one hundred and forty-seventh.

Elmer W. Voorheis, Clerk United States District Court, Eastern District of Michigan. [Seal of the District Court, Eastern District of Mich.]

Endorsed on cover: File No. 29,620. E. Michigan D. C. U. S. Term No. 329. Sam Silberschein, plaintiff in error, vs. The United States of America. Filed May 14th, 1923. File No. 29,620.

INDEX.

In The

Supreme Court of the United States

October Term, 1923.

No. 329.

SAM SILBERSCHEIN,

Plaintiff in Error,

v.

THE UNITED STATES OF AMERICA,

Defendant in Error.

In Error to the District Court of the United States For the Eastern District of Michigan.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF FACTS FOR PLAINTIFF IN ERROR.

This is a writ of error to review the decision of the District Court of the United States for the Eastern District of Michigan in dismissing a petition filed by plaintiff in error for compensation under the War Risk Insurance Act.

The petition was filed in pursuance of paragraph 20, Section 24, Chapter 2 of the Judicial Code of the United States, as found in the Act of March 3rd, 1911, Chapter 231, 36 Statutes at Large, 1093, which provides:

> "The District Court shall have concurrent jurisdiction with the court of claims of all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity or admiralty, if the United States were suable. Provided, however, that nothing in this paragraph shall be construed as giving to either the District Courts or the Court of Claims jurisdiction to hear and determine claims for pensions."

Plaintiff in error enlisted in the United States army on December 9th, 1917, at New York City and was discharged from military service on February 8th, 1918, on account of physical disability. Prior to his enlistment he was an able bodied man. At the time of his enlistment he stated to the examining officer that he had had a disease and such statement was noted in petitioner's military record at the time. Said disease did not prevent him from performing remunerative work or earning his living by the performance of same. Said disease was the only disorder or infirmity noted of record by an authority of the United States at the time of, or prior to plaintiff in error's inception of active service (R., 1). He was discharged from military service with disabilities consisting of chronic orchitis, varicose veins, fallen arches, articular rheumatism, osteoporosis (softening of the bone tissue), of the hands and feet, and other ailments, all of which were incurred in and resulted from an aggravation during military service of

said disease which existed prior to military service (R., 2). On his induction in the army he was not suffering from chronic orchitis, varicose veins, fallen arches, articular rheumatism, osteoporosis of the hands and feet and other ailments, from which he suffered upon his discharge. He has been totally disabled since his discharge on account of said disabilities, all of which were contracted in the military service and which were an aggravation during military service of said disease which existed prior to enlistment. His disability was incurred in and was aggravated by the character of military service which plaintiff in error was subjected to (R., 2). He was required to lie for long periods of time on moist and wet ground during rifle practice; was subjected to severe strain while marching with heavy equipment; was injured by violent bayonet and rifle practice, jumping and running; is permanently disabled and injured; will require operations and medical attention in the future. He was hospitalized almost continuously by the United States from his discharge until he commenced this action for compensation on February 2nd, 1922 (R., 2). The Bureau of War Risk Insurance on August 26th, 1918, awarded him compensation at the rate of $30.00 a month from February 9th, 1918, to July 15th, 1918, and later increased this award to $80.00 a month for that period, on account of disabilities and injuries sustained by him in the line of duty while employed in active military service; and he was awarded 100% compensation as for temporary total disability from July 16, 1918, to March 18th, 1921, but said award was reduced to 20% on the latter date. The director of the Veterans' Bureau held the disabilities of plaintiff in error to be noncompensable after March 18th, 1921 (R., 2-3). The ruling of the director of the Veterans' Bureau was not based on any facts found on the examination of plaintiff in error; said ruling and award were arbitrary, unjust and unlawful and constituted a usurpation of power by the Director of the Bureau; the decision reached on the claim of plaintiff in error was contrary to the proofs, if any, and the decision, was contrary to the undisputed evidence on file (R., 3).

The matters and things, which are said to constitute the unjust, arbitrary and unlawful action of the director of the Veterans' Bureau are as follows:

(a) Plaintiff in error was granted compensation to March 18th, 1921, and his compensation was discontinued thereafter, although his physical condition on and after that date did not improve, but on the contrary became worse, said disabilities after March 18th, 1921, being the same as and resulting from the same causes for which compensation was allowed to plaintiff in error to March 18th, 1921 (R., 4).

(b) The Director of the Veterans' Bureau only allowed plaintiff in error twenty per cent partial disability for the period July 16th, 1918, to March 18th, 1921, when the undisputed evidence, as found, showed that plaintiff in error was temporarily totally disabled during said period and was entitled to the maximum amount of compensation (R., 4).

(c) The only entry of any disorder, disease or infirmity made on proper Government records at the time of or prior to plaintiff in error's inception of service showed plaintiff in error to have had a disease and there was no entry in the records of the adjutant general's office, or in any military records showing plaintiff in error to have chronic orchitis, varicose veins, fallen arches, articular rheumatism, osteoporosis of the hands and feet and other ailments. That plaintiff in error was discharged from the military service with all of the ailments enumerated and is now suffering from said ailments and disabilities, all of which were incurred in and aggravated by his military service (R., 4).

(d) It was admitted by officials representing the Bureau of War Risk Insurance that plaintiff in error since his discharge from the military service has been suffering from disabilities incurred in and aggravated by his military

service, none of which disabilities were recorded on any military record at the time of, or prior to plaintiff's inception of military service (R., 1, 5, 10, 11, 12, 13).

Defendant moved to dismiss the petition on several grounds, the following being chiefly relied on (R., 15):

(1) That the United States has not consented to be sued on the claim covered by plaintiff's petition.

(2) That the director of the Veterans' Bureau has final disposition of all claims for compensation arising under the act creating the United States Veterans' Bureau, his action not being reviewable by the courts.

The lower court, after a hearing, dismissed plaintiff's petition.

SPECIFICATIONS OF ERROR FOR PLAINTIFF IN ERROR.

Plaintiff assigned eight errors, which may be grouped under the following headings (R., 23-24):

(a) That the court erred in dismissing plaintiff's petition on the ground that it failed to show sufficient facts and circumstances to entitle plaintiff to relief, and did not allege that plaintiff's temporary disability resulted from injuries received or disease caused or aggravated in the line of plaintiff's military duty.

(b) That the court erred in holding that plaintiff's petition failed to show that the decision of the director of the Veterans' Bureau was not in excess of his jurisdiction, was without evidentiary support and was not the result of arbitrary unfairness warranting the interference of said court.

(c) That the court erred in holding that the decision of the director of the Veterans' Bureau was not reviewable by said court.

BRIEF OF APPELLANT'S ARGUMENT.

(a) *Plaintiff's petition shows sufficient facts and circumstances to entitle plaintiff to relief, and alleges that plaintiff's temporary disability resulted from injuries received and disease caused and aggravated in the line of plaintiff's military duty.*

(1) The lower court stated in its opinion that plaintiff's petition failed to show sufficient facts and circumstances to entitle plaintiff to relief (R., 20). A reference to the petition will show the lower court was in error. In paragraph 5 of the petition it is stated, as follows (R., 1):

> "That petitioner was discharged from the military service of the United States on or about the day aforesaid with disability consisting of chronic orchitis, varicose veins, fallen arches, articular rheumatism, osteoporosis of the hands and feet, and other ailments, *all of which were incurred in and which resulted from an aggravation during military service of said disease existing prior to military service.*"

In paragraph seven of the petition it is stated (R., 2):

> "That petitioner is now and has been ever since his discharge from the military service of the United states totally disabled on account of *said disabilities which were contracted in the military service, and which resulted from an aggravation during military service of a disease existing prior to enlistment.*"

In paragraph fourteen (c) of the petition plaintiff states (R., 4):

"Petitioner was discharged from the military service with all of said ailments and disabilities (heretofore enumerated) and is at the present time suffering from said ailments and disabilities *incurred in the military service and aggravated by said military service.*"

In paragraph fourteen (d) of the petition, plaintiff states (R., 5):

"*No outside or intervening cause * * * resulted in or produced the disabilities, which your petitioner has at the present time (those enumerated) other than the military service which petitioner performed for the United States of America.*"

The facts stated in the petition entitling plaintiff to relief are:

That plaintiff went into the service able bodied and without disability (R., 1).

That he suffered disability while in the military service due to his military service (R., 2).

That he was discharged from the military service because he became disabled in the military service (R., 1).

That after his discharge from the military service he was examined by Government doctors, who determined that he was disabled on account of his military service (R., 6-7).

That at various times after his discharge he received compensation from the defendant, on account of disabilities incurred in the military service (R., 6-8).

That he is now totally disabled, as a result of the same causes, which led to his discharge from the military service, namely physical disability incurred by him while in the military service, due to his military service (R., 2).

The petition shows sufficient facts and circumstances, upon which plaintiff may recover compensation under the War Risk Insurance Act. The finding of the lower court was erroneous.

(b) *The decision of the Director was arbitrary, in excess of his jurisdiction and without evidentiary support.*

(1) The Power of the Director of the Veterans' Bureau is limited, not unlimited. It is subject to a reasonable exercise, and the limitation of positive law. In construing the finality of the Director's decision there must be considered not only the authority conferred on the Director, but also the right vested in the plaintiff. The power of the Director must, therefore, be viewed as it is affected by any limitation not only of law but by the Act of Congress in vesting a right in the plaintiff.

Powers of offices are classified as discretionary or ministerial. *29 Cyc., 1432-1433.* Over the former the courts have no control except where the discretion has been abused. Thus, if power has by law been given to an officer to determine a question of fact, his determination is final, in the absence of any controlling provisions of statute, provided he has not been guilty of an abuse of discretion.

> *State Board of Dental Examiners v. People, 123 Ill., 237; 13 N. E., 201.*
> *Yick Wo. v. Hopkins, 118 U. S., 356; 30 L. Ed., 220.*
> *U. S. v. Thurber, 28 Fed., 56.*

In *Cooke v. Iverson, 108 Minn., 388; 122 N. W., 251,* it is said:

> "According to his discretion means it is said, 'according to the rules of reason and justice, not private opinion.'"

It also has been interpreted to mean "according to law and not humor; not arbitrary, vague and fanciful but legal and regular; to be exercised not capriciously but on judicial grounds and for substantial reasons and "it must be exercised within the limits to which an honest man competent to the discharge of his office ought to confine himself" (*per Ld Kenyon, Wilson v. Rastall, 4 Term Rep., 754-758*), "that is within the limits and for the objects intended by the legislature." *Maxwell 147, 148.*

Stroud, Judicial Dictionary 542.

Par. 513, page 337, says:

> "Although the terms of the law creating the authority confer upon the officer general discretionary power without qualification, his authority is not to be deemed an unlimited one. The exercise of the officer's discretion is still limited, by legal construction, to the evident purposes of the act, and to what is known as a sound and legal discretion excluding all arbitrary, capricious, inquisitorial and oppressive proceedings."
>
> *U. S. v. Doherty, 27 Fed., 730.*
> *Rose v. Stuyvesant, 8 Johns (N. Y.), 426.*
> *President v. Patchen, 8 Wend (N. Y.), 47.*

The director of the Veterans' Bureau has authority under Section 1 of the Act of 1921, subject to the general direction of the President to decide all questions arising under the Act. But he must exercise that discretion according to reason. He cannot eliminate the results of medical examinations and arbitrarily say that the diagnosis is contrary to the finding of the medical authorities.

In deciding whether plaintiff is compensable or not, the director must weigh the evidence before him. He only should consider and study the relative findings and base

his conclusions on these findings. It is not within his province to overturn a record which overwhelmingly shows compensability and make a determination that there is non-compensability. If such were the intention of Congress, no examiners would have been provided at all. Everything would have been left to the whim of the director. By giving the director the right to decide questions, Congress vested a power, subject to a reasonable exercise. There is nothing in the Act that makes the director's decision conclusive on the court nor does the Act state that his decision shall be considered a final determination of the matter, or that the same shall never be reopened or reconsidered as was the case in the statute involved in the suit of *Babcock v. United States, 250 U. S., 327; 63 Law Ed., 1011.* Nor is there anything in the Act granting the director the right to determine in an arbitrary manner whether or not a soldier is compensable.

It would be arbitrary for the director to disregard the preponderance of the evidence or to substitute his judgment for the overwhelming evidence on file.

The lower court enunciated an erroneous rule when it stated that the question resolved itself into whether there was any evidence to sustain the director. Such is not the rule. The director is bound to weigh evidence in making his decision the same as a jury might. And if he disregards the overwhelming weight of evidence and bases his decision on evidence not of the greatest weight, his action is arbitrary, unjust and cannot be sustained when brought in question in a court of law.

The word "arbitrarily" has been defined in *4 C. J., 1475*, as meaning:

> "Without fair, solid and substantial cause and without reason given."

It also means:

> "Fixed or done capriciously or at pleasure with-

out adequate determining principles; not founded in the nature of things; nonrational; not done or acting according to reason or judgment; depending on the will alone; absolute in power; capricious."

In the case of Louisville v. Gagen, 132 Ky., 502; 116 S. W., 745; 118 S. W., 947, in reviewing the action of a board, the court said:

> "The purpose of allowing an appeal in cases of this sort is to correct any injustice that may have been done by the action of the board, and where the decision of the board is not a reasonable exercise of discretion, it is within the meaning of the rule heretofore laid down the arbitrary exercise of discretion."

In the instant case arbitrary power was exercised by the director of the Veterans' Bureau. Beside cutting down plaintiff's award to twenty per cent for the period July 16, 1918, to March 18, 1921, when the undisputed evidence as found, showed that plaintiff was temporarily totally disabled during said period, and was entitled to one hundred per cent, the Bureau discontinued the payment of any compensation to plaintiff after March 18, 1921, though it is alleged in the petition that plaintiff's physical condition after March 18 had become worse, and that the disability from which he suffered after March 18, 1921, was the same and resulted from the same causes, for which he was granted compensation to March 18, 1921 (R., 4).

It should also be noted that on November 23, 1921, eight and one-half months after plaintiff's compensation was cut off entirely, plaintiff was examined by medical officers of the Veterans' Bureau, who stated in a letter to plaintiff that he was in need of hospital care and treatment (R., 9). That the officers of the Veterans' Bureau at that time were seeking to hospitalize plaintiff; furnished to plaintiff, transportation; a hospital admission card (R., 12), orders for meals and lodgings enroute (see Exhibit H) and request for

meals on hotel, restaurants, dining cars and eating houses (R., 13).

Should defendant be permitted to say that plaintiff was not entitled to compensation or hospitalization and at the same time furnish him with transportation and requests for meals enroute together with a card of admission to a United States Public Health Service Hospital?

Such action shows that the director of the Veterans' Bureau acted arbitrarily in dealing with plaintiff's claim. The action of the director in making the arbitrary order is reviewable. Without the aid of this court, plaintiff will be thrown upon the charity of the community in which he lives, instead of receiving what is justly due him, from the government which took his services in time of war on the promise that in case he suffered a disability in the military service he would receive adequate compensation as a legal right.

(2) The statutes prescribing the duties of the Director of the Veterans' Bureau and limiting his authority and discretion, are the following:

> Section 300 of the War Risk Insurance Act, the Act of September 2, 1914, Chapter 293, 38 Stat. at Large, 711, as amended by Section 10 of the Act of June 25, 1918, 40 Stat. at Large, 609, amended again by Section 10-a of the Act of December 24, 1919, 41 Stat. at Large, 371, and amended further by Section 18 of the Act of August 9, 1921, 42 Stat. at Large, 147, abolishing the Bureau of War Risk Insurance and creating in its stead The Veterans' Bureau, provides as follows:
>
> "For death or disability resulting from personal injury suffered or disease contracted in the line of duty on or after April 6, 1917, or for an aggravation of a disability existing prior to examination, acceptance, and enrollment for service, when such aggravation was suffered and contracted in the line of

duty on or after April 6, 1917, by an * * * enlisted man, * * * the United States shall pay to such * * * enlisted man * * * compensation as hereinafter provided; but no compensation shall be paid if the injury, disease or aggravation has been caused by his own wilful misconduct. That for the purpose of this section every such * * * enlisted man * * * shall be conclusively held and taken to have been in sound condition when examined, accepted, and enrolled for service, except as to defects, disorders, or infirmities made of record in any manner by proper authorities of the United States at the time of, or prior to, inception of active service, to the extent to which any such defect, disorder, or infirmity was so made of record."

Section 302 of the War Risk Insurance Act, as amended by Section 11 of the Act of December 24, 1919, just cited, provided a classified schedule of awards payable to an enlisted man for the disability mentioned; the amounts depending upon the nature and extent of his disability and upon the kinship and number of his relatives.

Section 305 of the Act, as amended by Section 19 of the Act of August 9, 1921, cited, is as follows:

"Upon its own motion or upon application, the Bureau may at any time review an award and in accordance with the facts found upon such review, may end, diminish, or increase the compensation previously awarded or, if compensation is increased, or, if compensation has been refused, reduced or discontinued, may award compensation in proportion to the degree of disability sustained as of the date such degree of disability began, but not earlier than the date of discharge or resignation."

Section 2 of the Act of August 9th, 1921, reads, as follows:

"The director, subject to the general direction of

the President, shall administer, execute, and enforce the provisions of this act, and for that purpose shall have full power and authority to make rules and regulations not inconsistent with the provisions of this act, which are necessary or appropriate to carry out its purposes and shall decide all questions arising under this act except as otherwise provided herein."

Section 3 of said Act contains the following provisions:

"The functions, powers and duties conferred by existing law upon the Bureau of War Risk Insurance are hereby transferred to and made a part of the Veterans' Bureau."

Under these statutes the Director cannot arbitrarily pass upon claims. Nor has he an unlimited discretion. Plaintiff's claim relates to a vested legal right and he cannot be deprived of his compensation by the arbitrary action of a Bureau head. On the facts set forth in the petition a case is made showing an abuse of discretion by the Director of the Veterans' Bureau as well as arbitrary action by him.

(3) *Plaintiff's claim is not for a pension, but for compensation, a vested legal right. It is a claim to a right established by law, not a claim to a gratuity. Hence plaintiff cannot be deprived thereof by action of a Bureau head without right to a review of the decision by the court.*

Pensions have been defined as periodical allowances of money to a person, in the nature partly of a gratuity and partly in payment for past benefits conferred; payment because it is supposed to be in consideration of previous services rendered to the government or the public, for which the compensation before made, if any, was inadequate in proportion to the benefits received and the ability of a

nation in its prosperity to pay; a gratuity because it is not ordinarily founded on contract and in such case cannot be demanded as a legal right until the Government has acknowledged its moral obligation *and made the grant.*

See:

Donnelly v. U. S., 17 Court of Claims, 105.

It is also stated that a pension is but a bounty of the Government, in which the pensioner has no vested legal right and which Congress will give, withhold, distribute, or recall in its discretion.

Walton v. Cotton, 19 Howard, 355; 15 Law. Ed., 658.

U. S. v. Teller, 107 U. S., 64; 27 Law Ed., 352.

Thus a pension or an Act of Congress providing for a pension, does not vest or create a vested legal right in the party who is to benefit by the law. For this reason, whenever parties claiming pensions have invoked the jurisdiction of the Court of Claims, relief has been denied on the ground that the court has no jurisdiction to review the Act of the Commissioner of Pensions in cases where the claim has been disallowed. This holding is on the theory that no legal right vests in the party claiming the pension, until the claim has been allowed by the commissioner.

Compensation, however, differs from a pension in many particulars, chief of which may be said to be that it creates a vested property right in the soldier, provided the soldier suffered certain disabilities within the provisions of the Compensation Act, while in the military service.

That it was not contemplated by the framers of the War Risk Insurance Act to provide a mere gratuity or bounty by the enactment of the Compensation Act, reference should be had to the debates in Congress preceding the enactment of that measure.

Mr. DeWalt, Congressman, in the House of Representatives on September 8, 1917, said (See Congressional Record, 1917, page 6824):

> "Now, this is compensation to whom? Compensation to the man who has made the contract with the Government that he will give the Government his service. Now, my friends, there is one matter of particular importance that strikes me in this discussion, and that is this: This compensation feature is not a new feature in the history of legislation. We have today upon the statute books, the Federal Compensation Law in regard to injuries which may occur to the very people who are employed here in the Capitol Building. * * * If you have been wise enough and generous enough to place upon the statute books of this nation, a law which compensates these people, why should you not put on the statute books a law compensating the soldier who goes to the front and is willing to sacrifice his life for his country?"

In the hearings before the sub-committee of the Committee on Finance of the U. S. Senate, 65th Congress, first session, on H. R., 5723, being an act to amend an act entitled "An Act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department," testimony was given by various individuals showing conclusively that compensation under the War Risk Insurance Act was not to be considered a pension or in the nature of a pension, but was intended to create an absolute liability in the Government and a vested right in the soldier and sailor.

On page 14, of that report, there is a statement made by Mr. Ide, President of the Home Life Insurance Company and Chairman of the Insurance Committee appointed by the Secretary of the Treasury, as follows:

> "It is the aim of this bill to provide fair, just, and generous compensation for the soldiers and sail-

ors and their dependents in return for the enormous sacrifices they are now about to make for their country's good; to provide a definite and comprehensive plan which will cover all contingencies and *which will become part of the man's contract agreement with the government. Its benefits are to become part of his emolument or wage and there must not be the slightest element of charity or philanthropy in it.* Every benefit accruing under it is simply a payment of a just debt due the man. Therefore, we can at once forget the specious argument that if we liberalize its terms in any respect we are discouraging thrift. Anything which is in the bill now or is proposed which does not measure up to the standard of a just national obligation should be eliminated."

On page 23 of the same report, there is a statement by the Committee of which Mr. Ide was chairman, part of which reads as follows:

"The general aim of this article of the bill, which is to provide a scientific basis of compensation for death or disability in lieu of any system of pensions like the one at present prevailing, is manifestly sound and wise. In the consideration of such a measure it should, in our opinion, be the aim of the Government to provide adequate and liberal compensation for citizens who have entered into this hazardous occupation for the country's good, but the bill must be entirely free from all ambiguity or extravagance and limited in its application to those who are actually and not sentimentally dependent upon the enlisted man."

On page 31 of the same report, the following was stated:

"The payment of claims, in order to satisfy the beneficiaries, must be prompt and businesslike."

On page 55 of the same report, Mr. H. L. Ekern of Madison, Wisconsin, testified before the Committee:

"The insurance feature is a very important part of this bill as it stands now, and for this reason: The bill provides for protection under the workman's compensation feature to those who are injured or killed in the service only in the case that they have immediate dependents, such as a surviving widow or minor children or a dependent mother, in any case, it must be immediate dependents. * * *

The government is doing no more than taking care of its own employees. The soldiers and sailors are employees, and the Government is merely providing what these men are deprived of by reason of this service."

On page 65 of the same report, there appears a colloquy between Judge Mack and Senator Smoot, where they discuss certain interpretations which were placed on provisions of the law as applied to pensions, as distinguished from the same provisions as they were to be understood under the Compensation Act, as follows:

"Senator Smoot: This is virtually a pension provision, and it seems to me it could be construed to apply exactly the same as the law applied to pensions.

Judge Mack: I differ with you, and for this reason: In the first place, it is compensation based on the analogy of the compensation act and therefore the pension system would not be looked to in all probability for an analogy."

It was the intention of the Committee to create a vested legal right in the soldier and sailor on account of disability received while in the military service. In no place does an intention appear that compensation to be received by the soldier and sailor was to be in the nature of a pension or gratuity.

Another section of the Act which tends to show that the Compensation Act created a vested right in the soldier and

sailor is Section 313 of Article 3 of the War Risk Act, which reads as follows:

> "That if any injury or death, for which compensation is payable under this article is caused under circumstances creating a legal liability upon some other person than the United States or the enemy, to pay damages, the director, as a condition to payment of compensation by the United States may require the beneficiary to assign to the United States, any right of action he may have to enforce such liability of such other person, or if it appears to be for the best interests of the beneficiary, the director may require him to prosecute the said action in his own name, subject to regulation."

Inversely, if such injury were caused without creating a legal liability in some other person than the United States it created a legal liability in the United States and compensation is required to be paid, under the statute, as a matter of right and not as a gratuity.

It is clear, that Congress intended to vest a legal right to compensation in each and every person entering the military service, in case he or she suffered disability while in the military service, as a result of said military service. That being so, the right cannot be divested by the action of the director of the Veterans' Bureau.

THE DECISION OF THE DIRECTOR IS REVIEWABLE.

(a) *The statute under which plaintiff claims his right makes no provision for redress in case of a wrongful refusal to grant the right.*

It is contended by the Government that inasmuch as the War Risk Insurance Act does not provide for the institution of suit in case of disagreement on a compensation claim, as it does in case of a disputed insurance claim, the remedy prescribed by the statute is exclusive, and this court and the Court of Claims have no jurisdiction to review the decision of the director of the Veterans' Bureau in such case.

We have here a right created by Act of Congress. The plaintiff has a right to file a claim for compensation, and the statute prescribes that in case he suffers from a certain disability, he is to receive compensation under the War Risk Insurance Act. But there is no remedy along with this right which has been created, for a wrongful refusal to grant the right. Can we presume that Congress intended in such case to make the decision of the director of the Veterans' Bureau final?

The law is well settled, that where a special right is given by statute, and in that statute a special remedy for its violation is provided, the statutory remedy is the only one. But this principle has no application to those portions of the statute of the War Risk Insurance Act covering compensation, because no remedy for a refusal to grant the right is given by the statute.

The principle is fully stated in the case of *Medbury v. United States, 173 U. S., 492; 43 Law Ed., 779.* There a petition was filed to recover under the Act of June 16, 1880. Congress had granted land to a Wisconsin railroad. Alternate sections were reserved by the Government, the price

of which were raised from $1.25 to $2.50 an acre. Samuel Medbury entered on 7000 acres, paying $2.50 an acre, after which the railroad company did not comply with the grant, the land granted to the railroad reverted to the United States, and the land purchased by Medbury ceased to be alternate sections of land within a railroad grant. Claim was therefore made under the Law of 1880 to recover the excess paid over $1.25 an acre for the land. The claim was denied by the Secretary of the Interior, who was authorized by the law to make payments provided for in the act.

The first question raised was as to the jurisdiction of the Court of Claims. Justice Peckham said:

> "Although the right to recover back the excess of payment in this proceeding is based upon the statute of 1880, we do not think it comes within the principle of those cases which hold that where a liability and a remedy are created by the same statute, the remedy thus provided is special and exclusive. In this case it is not a right and a remedy created by the same statute. The statute creates the right to have repayment under the facts therein stated, but it gives no remedy for a refusal on the part of the Secretary to comply with its provisions. The person has the right under the act to obtain a warrant from the Secretary of the Interior for the repayment of the excess therein mentioned, and for the purpose of obtaining it he must make his application and prove the facts which the statute provides, and then the Secretary is to draw his warrant on the treasury. This constitutes the right of the appellant. Applying for the warrant is not a remedy. When application for repayment is made, there is nothing to remedy. He has not been wronged. A right of repayment of money theretofore paid has been given by the act, but it is only under the act that the right exists. * * * After the refusal, the question then arises as to the remedy and you look in vain for any in the act itself.

We cannot suppose that Congress intended in such case to make the decision of the Secretary final when it was made on undisputed facts. If not, then there is a remedy in this court of claims, for none is given in the act which creates the right. The procedure for obtaining the repayment as provided for in the act must be followed, and when the application is erroneously refused, the party wronged has his remedy, but that remedy is not furnished by the same statute which gives him the right."

"We have been referred to no case in this court which holds views contrary to those herein presented. We do not mean by this decision to overrule or to throw doubt upon the general principle that where a special right is given by statute and in that statute a special remedy for its violation is provided, that in such case the statutory remedy is the only one, but we hold that such principle has no application to this particular statute, because the statute does not, in our judgment, within the meaning of the principle mentioned furnish a remedy for a refusal to grant the right given by the statute."

In the statute under which plaintiff seeks to claim compensation there is no remedy for the wrongful refusal to give compensation to an applicant therefor, and therefore such applicant, after he has exhausted his remedy in the Bureau of War Risk Insurance, has a right to seek his remedy in court, especially since the facts are not in dispute and show plaintiff to be entitled to relief under the terms of the statute.

(b) *The petition filed by plaintiff raises a question of law which must be considered by this court.*

(1) Plaintiff's petition shows that he was awarded compensation. He challenges the correctness of the award.

He also shows that after an award was made providing compensation as for temporary total disability and a check was forwarded to plaintiff, such award was changed to temporary partial disability, such action being contrary to the undisputed evidence on file in plaintiff's case which showed plaintiff to be temporarily totally disabled (R., 4).

(2) Plaintiff further states in his petition that he was in good physical condition at the time he entered the military service of the United States. That on his discharge he was suffering from disability and still suffers from such disability and that such disability is due to his military service (R., 1).

Section 300 of the War Risk Insurance Act provides that

> *"for the purposes of this section said * * * enlisted men * * * shall be conclusively held and taken to have been in sound condition when examined, accepted, and enrolled for service, except as to defects, disorders or infirmities made of record in any manner by proper authorities of the United States at the time of or prior to inception of active service to the extent to which any such defect, disorder or infirmity was so made of record."*

That there was a disability on discharge is not disputed. That there still is a disability is not disputed either, it being now claimed that said disability did not result from plaintiff's military service. Under the law this matter is not open to the Government as a defense, as the soldier was examined, accepted, and enrolled for service without any record of the disabilities from which he suffered on his discharge. He was therefore held and taken to be in sound physical condition, except as to what was noted on his service record (R., 3). Having been discharged with disabilities, he is entitled to compensation.

A question of law is raised which must be decided by this court: Can the Director of the Veterans' Bureau refuse compensation to the soldier where he was accepted for service without certain disability, and was discharged from service with disability incurred in or aggravated by his miltary servce. As a matter of law plaintiff is entitled to compensation, as he was conclusively held and taken to have been in sound condition except as to what was noted on his military record on his entry into service.

(c) *This court has gone so far as to grant a review of all decisions of accounting officers.*

In the recent case of *United States v. Laughlin, 249 U. S. Sup. Ct., 440-448; 63 L. Ed., 696,* an appeal was taken from the Court of Claims to review a judgment for the refund of excess payments for public lands. The claim for refund was based on a law of Congress which provided that in all cases where it should appear to the satisfaction of the Secretary of the Interior that any person had made payments to the United States under the Public Land Laws in excess of the amount he was lawfully required to pay, such excess should be repaid to such person.

The Government contended that the court of claims had no jurisdiction of the subject matter, as a favorable decision by the Secretary of the Interior was a condition precedent to the right of recovery, and since the Secretary disallowed the claim, because not satisfied that an excessive payment had been made there was no violation of Laughlin's rights and hence he had no claim founded on an act of Congress.

Justice Pitney said:

> "We cannot accept this construction of paragraph 2 of the Act of 1908. According to it, although the

facts were made to appear to the entire satisfaction of the Secretary * * * it would rest in the uncontrolled judgment and discretion of the Secretary to deny repayment of the excess because not satisfied that it ought to be repaid notwithstanding Congress declared that, under the precise state of facts, it should be repaid. Under this construction, the legislative power would in effect be delegated to the Secretary. In our view it was the intent of Congress that the Secretary should have exclusive jurisdiction to determine disputed questions of fact, and that as in other administrative matters his decisions on questions of law should be reviewable by the Courts. In the case before us, the facts were not and are not in dispute * * * whether as a matter of law, they made a case of excess payment, entitling claimant to repayment * * * was a matter properly within the jurisdiction of the Court of Claims."

So in the case at bar, the facts were not and are not in dispute. The petition alleges that the undisputed evidence shows that plaintiff in error was and is temporarily totally disabled as a result of his military service. It is, therefore, not within the province of the duties of the director to withhold payment. His action in doing so is reviewable by this court as in the *Laughlin case, supra.* Congress did not divest this court, or the court of claims, of its jurisdiction to review decisions of the director of the Veterans' Bureau, by granting the director of the Veterans' Bureau authority to decide all questions arising under the War Risk Insurance Act.

In the case of *United States v. Harmon, 147 U. S., 268; 37 Law Ed., 164,* an action was brought by a United States Marshal against the United States for fees and expenses. The Comptroller of the Treasury, prior to the institution of suit in the United States Court, had disallowed the Marshal's claim. Justice Blatchford said that a material question in the case was whether the court had jurisdic-

tion to pass on the items of the claim which were disallowed by the Comptroller. It was contended for the United States that except where Congress, by special law, empowers some court or executive officer to hear and determine a claim against the United States, the accounting officers of the Treasury Department alone have the power to hear and determine it.

The court said that the action of the Comptroller or of the Commissioner of Customs was subject to the revision of heads of departments and that the action of accounting officers of an executive department was never considered as a conclusive determination when the question was brought before a court of Justice. That the sole purpose and effect of the Act of 1868 was to regulate the business of the executive department; to confine the comparative powers of the Comptrollers or Commissioners of Customs on the one hand, and of the heads of departments on the other hand in the performance of their executive and ministerial duties and to make the decision of a Comptroller or of a Commissioner of Customs final and conclusive so far as the executive department was concerned, but not to affect the powers of the legislature or of the judicial department.

The court, further said, that even before the passage of the Act of 1887, the Court of Claims had jurisdiction of claims under an act of Congress or under a contract, and stated that it did not believe that the Act of 1887, entitled "An Act to provide for the bringing of suits against the Government of the United States," the manifest scope and purpose of which are to extend the liability of the government to be sued, was intended to take away a jurisdiction already existing, and to give to the decision of accounting officers an authority and effect which they never had before.

The case of *United States v. Real Estate Savings Bank of Pittsburgh, 104 U. S., 728; 26 Law Ed., 908*, was an ap-

peal from the court of claims on a claim filed for reimbursement for taxes illegally assessed. The Government challenged the jurisdiction of the Court of Claims. The plaintiff based his action on a revised statute authorizing the Commissioner of Internal Revenue to refund taxes illegally assessed or collected.

The Supreme Court held that under that law, a legitimate claim may be prosecuted against the collector and an allowed claim not paid may be sued for in the Court of Claims, and that where a collector had rejected the claim, an appeal would have to be taken to the commissioner and the claim rejected there before suit could be maintained.

In the case at bar, plaintiff's claim for compensation was rejected by final decision of the director of the Veterans' Bureau. Plaintiff therefore, under the foregoing decisions has a right to appeal to this court for a legal determination of the validity of the decision rendered by the Director of the Veterans' Bureau on plaintiff's claim.

Another case bearing directly on the question of the finality of the decisions of a bureau head or departmental head, is that of *Wisconsin Central Railroad Company v. United States, 164 U. S., 189; 41 Law Ed., 399.*

That was an appeal by the railroad from a decision of the Court of Claims allowing a certain amount as compensation for carrying mails. Section 5 of the Act of 1864 provided that the United States mail should be transported over certain roads under the direction of the Post Office Department, at prices, prescribed by the Postmaster General, who had power to determine the same. In the course of the opinion, Chief Justice Fuller stated that the Postmaster General, in directing the payment of compensation for mail transportation under the statute providing the rate and basis thereof, does not act judicially, and whatever the conclusiveness of the executive acts, so far as executive departments are concerned, as a rule of admin-

istration, it has long been settled that the action of executive officers, in matters of account and payment, cannot be regarded as conclusive determinations when brought in question in a court of justice. He also said:

> "The view thus indicated, that executive decisions in cases like the present are not binding on the courts, has been repeatedly affirmed and steadily adhered to."

The duty of the Director of the Veterans' Bureau in passing upon claims which are presented against the Government for compensation does not differ from that of the Postmaster General in passing upon claims made by railroads for transportation of mail. The Acts of Congress in both cases fix and determine the amount that is to be paid under each contingency, with the result that the allowance or rejection of the claim in either of the cases is an executive act. While it is binding on the Treasury Department, the authority having been vested in the Bureau Head, it cannot be said to be binding on the parties interested, when an arbitrary decision has been made or when there has been an invasion of a clear legal right of the plaintiff. The action of any bureau head cannot be regarded as a conclusive determination when brought in question in a court of justice.

CONCLUSION.

Plaintiff has established the following argument:

(1) That the petition filed shows sufficient facts and circumstances to entitle plaintiff to the relief prayed for.

(2) That this court has jurisdiction to review the findings of the Director of the Veterans' Bureau in such cases where the decision of the director of the Veterans' Bureau shows, that the decision complained of was made without evidentiary support and was the result of arbitrary unfairness.

(3) That the petition herein shows that the Director of the Veterans' Bureau acted arbitrarily and in excess of his jurisdiction and that his finding was unsupported by facts.

(4) That plaintiff's petition raises a question of law of which this court has jurisdiction.

(5) That the Director of the Veterans' Bureau is an accounting officer, whose decision is reviewable.

The decision of the lower court should be reversed and the case remitted for a hearing on the merits.

Respectfully submitted,

FIXEL & FIXEL,
Attorneys for Plaintiff in Error.

ROWLAND W. FIXEL,
Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1924

SAM SILBERSCHEIN, PLAINTIFF IN ERROR
v. } No. 66
THE UNITED STATES

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN

BRIEF FOR THE UNITED STATES

STATEMENT

This is a suit to recover compensation to which plaintiff in error claims to be entitled under the so-called amendatory War Risk Insurance Act of August 9, 1921, Section 18, 42 Stat. 147 (R. p. 3), and Section 11 of the Act of December 24, 1919, 41 Stat. 371. A motion to dismiss was sustained. (R. p. 16.) The question of the jurisdiction of the court below has been certified to this court. (R. p. 22.)

ARGUMENT

The War Risk Insurance Act, including its several amendments, negatives any right to maintain a suit against the United States for the recovery of compensation granted by that Act.

The amendatory Act of October 6, 1917, Section 408, Chap. 105, 40 Stat. 398, 410, reads in part as follows:

> That in the event of disagreement as to a claim under the contract of insurance between the bureau and any beneficiary or beneficiaries thereunder, an action on the claim may be brought against the United States in the district court of the United States in and for the district in which such beneficiaries or any one of them resides.

The Act in which the above provision appears provides also in great detail for both disability compensation and insurance payments, so that the restriction in the same Act to "a claim under the contract of insurance", of the right to sue the United States in the District Court, can not reasonably be construed otherwise than as a legislative intent to withhold the right of suit for mere disability compensation. That the omission can not be construed as a legislative inadvertence seems to be definitely established by the further amendment of May 16, 1918, chap. 79, 40 Stat. 554, 555, which repealed the aforesaid Section 405 of the Act of 1917, and amended Section 13 of that Act to read as follows, so far as here pertinent:

> *Provided, however,* That payment to any attorney or agent for such assistance as may be

required in the preparation and execution of the necessary papers shall not exceed $3 in any one case: *And provided further*, That no claim agent or attorney shall be recognized in the presentation or adjudication of claims under articles two, three, and four, except that in the event of disagreement as to a claim under the contract of insurance between the bureau and any beneficiary or beneficiaries thereunder an action on the claim may be brought against the United States in the district court of the United States in and for the district in which such beneficiaries or any one of them resides, and that whenever judgment shall be rendered in an action brought pursuant to this provision the court, as part of its judgment, shall determine and allow such reasonable attorney's fees, not to exceed five per centum of the amount recovered, to be paid by the claimant in behalf of whom such proceedings were instituted to his attorney, said fee to be paid out of the payments to be made to the beneficiary under the judgment rendered at a rate not exceeding one-tenth of each of such payments until paid.

Any person who shall, directly or indirectly, solicit, contract for, charge, or receive, or who shall attempt to solicit, contract for, charge, or receive any fee or compensation, except as herein provided, shall be guilty of a misdemeanor, and for each and every offense shall be punishable by a fine of not more than $500 or by imprisonment at hard labor for not more than two years, or by both such fine and imprisonment.

Here again the right of suit is not only restricted to claims under insurance contracts, but the *limitation* upon attorneys' services also cogently discloses a deliberate purpose to deny the right of suit on claims like the one here involved.

It was natural that Congress should withhold the right of suit in mere compensation cases for in Sections 13 of the Acts of 1917 and 1918, supra, it specifically constituted the Director the sole tribunal to "decide all questions arising under the Act" except where suit was affirmatively authorized. *Forbes* v. *Welch*, 286 Fed. 765. Moreover compensation for disability never became a fixed and enduring allowance. Its changeability was thus provided for in Section 305 of the Act of 1917, supra, which reads as follows:

> That upon its own motion or upon application the bureau may at any time review an award, and, in accordance with the facts found upon such review, may end, diminish, or increase the compensation previously awarded, or, if compensation has been refused or discontinued, may award compensation.

It could therefore well happen that while any suit such as that at bar was in course of adjudication a valid change might be made in the compensation in dispute which would make it impossible for the court to render a collectible judgment. The award of compensation is subject to this contingency until actually paid.

It is axiomatic that the right to sue the United States must be clearly conferred. *Schillinger* v. *United States*, 155 U. S. 163. In the case at bar the right of suit seems to have been deliberately withheld. As further bearing on the rule to be applied here see *United States* v. *Pfitsch*, 256 U. S. 547, 552 et seq.

II

The so-called Tucker Act does not authorize suit for the compensation here involved

Assuming, arguendo, that the War Risk Insurance Act and its various amendments were not intended to deny right of recovery against the United States in a suit for disability compensation, it only remains to consider whether the provisions of the so-called Tucker Act, now embraced in Paragraph 20 of Section 24 of the Judicial Code, are broad enough to include the suit at bar. The said statute reads as follows:

> Concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counterclaims,

> claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: *Provided, however,* That nothing in this paragraph shall be construed as giving to either the district courts or the Court of Claims jurisdiction to hear and determine * * * claims for pensions * * *.

The first serious objection to the maintenance of the suit under the above statute is found in the fact that the claim for compensation is not such a claim on account of which a "party would be entitled to redress against the United States, either in a court of law, equity or admiralty, if the United States were suable."

The compensation here involved is a mere gratuity, bounty, or benefit which Congress could have originally withheld, or may now modify or repeal. That it is not bestowed as an inducement to service in the military branch is disclosed by the fact that the beneficiaries thereof are not limited to those entering the service after its passage, but extend as well to persons already in the service. Section 22 of the War Risk Insurance Amendment of October 6, 1917, 40 Stat. 398, 401, contains the following definitions:

> In Articles II, III, and IV of this Act, unless the context otherwise requires—
>
> * * * * * *
>
> (7) The terms "man" and "enlisted man" mean a person, whether male or female, and whether enlisted, enrolled, or drafted into

> active service in the military or naval forces of the United States, and include noncommissioned and petty officers, and members of training camps authorized by law.
>
> (8) The term "enlistment" includes voluntary enlistment, draft, and enrollment in active service in the military or naval forces of the United States.

Notice that the benefits of the Act are conferred not only upon enlisted men, but also upon those who have been drafted for service. They all share equally. It could scarcely be contended that a person compelled by draft to serve in the Army gave his service in consideration of the benefits prescribed by the law here under review, and therefore obtained a vested right in such benefits. He is grouped with the voluntarily enlisted men, and it would be hard for the latter to spell out a greater right under the statute. The legislative intention must, of course, control, and the whole scheme of the several amendatory War Risk Acts forbids construing them as pay instead of gift statutes.

Moreover, disability compensation partakes of all the elements of a pension as defined by this court in *United States* v. *Hall*, 98 U. S. 343, 350, as follows:

> Regular allowances paid to an individual by government in consideration of services rendered, or in recognition of merit, civil or military, are called pensions.

See also *Frisbie* v. *United States*, 157 U. S. 160, 166.

As the compensation provided by the War Risk Insurance Acts is not distinguishable on principle from allowances granted in prior pension statutes, it can not be treated otherwise than as a pension, and for that reason specifically withheld from the provisions of the so-called Tucker Act, supra.

This is rendered more certain in case of plaintiff in error, for the statute increasing the monthly allowance from $30 to $80 for total disability, which latter sum is now claimed by him as a vested right, was not enacted until December 9, 1919, 41 Stat. 370, 373, nearly two years after he was discharged from the military service on account of physical disability. (R. p. 1.) Under these circumstances his assertion of a contractual or legal right is futile.

III

So-called Tucker Act not applicable for additional reason case at bar involves disputed facts

Should this court conclude that claims for compensation fall within the description of claims on which suits are authorized by the so-called Tucker Act, supra, then it is suggested that no suit will lie in the case at bar for the reason, as pointed out by the court below, it involves disputed questions of fact. The lower court's opinion (R. p. 16) upon the point seems to need no elaboration.

IV

It is respectfully submitted that the judgment below should be affirmed.

JAMES M. BECK,
Solicitor General.
WILLIAM J. DONOVAN,
Assistant Attorney General.
HARRY S. RIDGELY,
Attorney.

OCTOBER, 1924.

○

SILBERSCHEIN *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

No. 66. Argued October 13, 1924.—Decided November 17, 1924.

1. The War Risk Insurance Act, as amended, commits to the Director of the Veterans' Bureau the duty and authority of administering its provisions and of deciding all questions arising under it. P. 225.
2. The decision of the Director upon a right to compensation claimed under the act, is final and conclusive and not subject to judicial review, at least unless the decision be wholly unsupported by evidence, wholly dependent upon a question of law, or clearly arbitrary or capricious. *Id.*
3. The act authorizes the Director to discontinue compensation which he finds to have been erroneously awarded. P. 224.
4. Disability, to be compensable under the statute, must have resulted from injury or disease caused or aggravated in the line of duty. *Id.*

5. Evidence tending to prove the unsoundness of the Director's determination of a matter properly submitted to his judgment, *held* to fall far short of proving the determination arbitrary. P. 224. 285 Fed. 397, affirmed.

ERROR to a judgment of the District Court dismissing an action brought against the United States under subdivision 20 of Jud. Code § 24, on a claim for compensation under the War Risk Insurance Act, upon the ground that the determination of the matter by the Director of the Veterans' Bureau was final and not reviewable by the courts.

Mr. Rowland W. Fixel for plaintiff in error.

Mr. Assistant Attorney General Donovan, with whom *Mr. Solicitor General Beck* and *Mr. Harry S. Ridgely* were on the brief, for the United States.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This writ of error brings here for determination the question whether the United States may be sued under subd. 20, § 24 of the Judicial Code, upon a claim for compensation arising under § 300 of the War Risk Insurance Act, as amended by § 10, c. 104, 40 Stat. 609, 611, and subsequent acts; and, if so, under what circumstances such suit may be maintained. That section, so far as necessary to be stated, provides that compensation shall be paid to any enlisted man for a disability resulting from personal injury suffered or disease contracted in the line of duty when employed in active military service. The statute fixes a scale of monthly payments, dependent upon the extent of the disability. See § 11, c. 16, 41 Stat. 371, 373. The administration of the original act was committed to the Director of the War Insurance Bureau, § 13, c. 105, 40 Stat. 399, and so remained until the creation of the Veterans' Bureau by the Act of August 9, 1921, c. 57, 42 Stat. 147, when the authority was devolved upon

the Director of that Bureau. The official, in each instance, was directed to administer, execute and enforce the provisions of the act, with authority to make rules and regulations not inconsistent therewith necessary or appropriate to carry out its purposes and "decide all questions arising under this Act," except as otherwise provided therein. See § 2 of the 1921 Act, 42 Stat. 148.

An examination of the original act and the various amendatory acts fails to disclose, so far as this question is concerned, any exception to or limitation upon the authority of the Director. There is no provision therein expressly granting the right to maintain any suit against the United States in respect of claims for such compensation.

The original Act of 1917 and subsequent amendatory acts conferred upon the Bureau the authority to revise an award at any time, in accordance with the facts found, and to end, diminish or increase compensation previously awarded. § 305, c. 105, 40 Stat. 398, 407; § 19, c. 57, 42 Stat. 154.

The court below, after a very full review, dismissed the petition, holding that it was the evident intention of Congress to confer upon the Director full and exclusive authority to decide all questions arising under the act, in so far as they involved the exercise of executive duties and required the determination of disputed questions of fact, and to the extent indicated, to make his decision final and not reviewable by the courts. 285 Fed. 397; 280 Fed. 917.

Plaintiff in error was in the military service as an enlisted man from December 9, 1917, until February 8, 1918, when he was discharged on account of physical disability. He was, at first, awarded compensation as for a total temporary disability, which was subsequently reduced to twenty per cent. as for a temporary partial disability, § 11, c. 16, 41 Stat. 371, 373, and finally taken away altogether on and after March 18, 1921, on the ground that the disability had ceased to be compensable.

The petition alleged that the decision of the Director was arbitrary, unjust and unlawful, constituted a usurpation of power, was "contrary to the proofs, if any," and "contrary to the weight of evidence on file in petitioner's case." The action of the Director was alleged to be arbitrary:

(1) Because after allowing compensation he discontinued it, although petitioner's physical condition had not improved but had become worse, *being the same and resulting from the same causes for which compensation was originally allowed.* But this is to say only that the Director had changed his mind; and, for aught that appears, that may have been based upon another and better view of the facts. Ample authority for his action is found in the provision already referred to, conferring power upon the Bureau to revise an award at any time and to end, diminish or increase the compensation.

(2) Because he allowed for temporary *partial* disability when the undisputed evidence as found showed that petitioner was temporarily *totally* disabled. But, as the court below pointed out, it is not alleged that such evidence showed that such disability resulted from injury or disease caused or aggravated "in the line of duty," as provided by the statute.

(3) Because petitioner was suffering from disabilities shown by entries in the Adjutant General's Office not to exist at the time of his entering into the service, and there was no cause therefor other than petitioner's military service; that it was admitted by the Veterans' Bureau hospital authorities that since his discharge petitioner had been suffering from disabilities incurred in the military service, as evidenced by communications and letters attached to petition. These are all matters bearing, at most, upon the soundness of the Director's determination upon a matter properly submitted to his judgment, and fall far short of establishing its arbitrary character.

The general allegations of the petition that the Director's decision was arbitrary, unjust and unlawful, and a usurpation of power, are merely legal conclusions. Clearly, the petition does not present a case where the facts are undisputed and the only conclusion properly to be drawn is one favorable to petitioner, or where the law was misconstrued, or where the action of the executive officer was arbitrary or capricious.

We pass, without deciding, the question raised by the contention of the Government that the claim is in fact for a pension and, hence, expressly excluded from judicial review by the terms of subd. 20, § 24, of the Judicial Code, and that, in any event, it is for a mere gratuity for which no suit can be maintained, even if the United States were otherwise suable; since, in any view of the matter, we conclude that no case is made for judicial intervention.

The statute which creates the asserted right, commits to the Director of the Bureau the duty and authority of administering its provisions and deciding all questions arising under it; and in the light of the prior decisions of this Court, we must hold that his decision of such questions is final and conclusive and not subject to judicial review, at least unless the decision is wholly unsupported by the evidence, or is wholly dependent upon a question of law or is seen to be clearly arbitrary or capricious. *Bates & Guild Co.* v. *Payne*, 194 U. S. 106, 108–110; *Medbury* v. *United States*, 173 U. S. 492, 497–498; *Ness* v. *Fisher*, 223 U. S. 683, 691–692; *Degge* v. *Hitchcock*, 229 U. S. 162, 171; *Int. Com. Comm.* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 547; *Int. Com. Comm.* v. *Louis. & Nash. R. R. Co.*, 227 U. S. 88, 91.

Since it is not made to appear from the allegations of the petition that any of these exceptional conditions exist, the judgment of the District Court must be and it is

Affirmed.